

F2qdsecc

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

-----x

3 SECURITIES and EXCHANGE
4 COMMISSION

Plaintiff

5 v.

13 Civ. 01735 (GBD)

6 CARRILLO HUETTEL LLP, LUIS J.
7 CARRILLO, WADE HUETTEL,
8 GIBRALTAR GLOBAL SECURITIES,
9 INC., WARREN DAVIS, BENJAMIN
T. KIRK, JAMES K. HINTON,
LUNIEL DeBEER, DYLAN BOYLE,
Defendants.

-----x

11 SECURITIES AND EXCHANGE COMMISSION,

12 Plaintiff,

13 v.

13 Civ. 2575 (GBD)

14 GIBRALTAR GLOBAL SECURITIES, INC.
15 and WARREN A. DAVIS,

Defendants.

-----x

17 February 26, 2015
18 10:38 a.m.

19 Before:

20 HON. GEORGE B. DANIELS

21 District Judge

22 APPEARANCES

23 SECURITIES and EXCHANGE COMMISSION
Attorneys for Plaintiff

24 BY: TODD DANIEL BRODY (13 Civ. 1735)
25 KEVIN P. O'ROURKE (13 Civ. 2575)

F2qdsecc

APPEARANCES CONTINUED

PECKAR & ABRAMSON, PC

Attorneys for Defendant Luis J. Carrillo

BY: DORIS D. SHORT

GAGE SPENCER & FLEMING, LLP

Attorneys for Defendant Wade Huettel

BY: WILLIAM B. FLEMING

DeFEIS O'CONNELL & ROSE, PC

Attorneys for Defendants Gibraltar Global
Securities and Warren Davis

BY: PHILIP C. PATTERSON

MURPHY & McGONINGLE, PC

Attorneys for Defendant Benjamin T. Kirk

BY: STEVEN D. FELDMAN

LAW OFFICE OF DAVID GOUREVITCH

Attorney for Defendant Luniel DeBeer

BY: DAVID U. GOUREVITCH

F2qdsecc

1 THE CLERK: SEC versus Carrillo Huettel, 13CV01735,
2 and SEC versus Gibraltar Global Securities, Inc., 13CV2575.

3 Will the parties please rise and make their
4 appearances beginning with the SEC

5 MR. BRODY: Todd Brody for the SEC in the Carrillo
6 Huettel case.

7 THE COURT: Good morning.

8 MR. O'ROURKE: Kevin O'Rourke for the SEC in the
9 Gibraltar and Davis case.

10 THE COURT: Good morning.

11 MR. PATTERSON: Philip Patterson, DeFeis O'Connell &
12 Rose, for Warren Davis and Gibraltar. Good morning, your
13 Honor.

14 THE COURT: Good morning.

15 MR. FELDMAN: Good morning, Judge. Steven Feldman,
16 Murphy & McGoningle, on behalf of Benjamin Kirk.

17 THE COURT: Good morning.

18 MR. GOUREVITCH: Good morning, your Honor. David
19 Gourevitch on behalf of Luniel DeBeer.

20 THE COURT: Good morning.

21 MS. SHORT: Good morning, Judge. Doris Short, from
22 Peckar & Abramson, on behalf of Luis Carrillo.

23 THE COURT: Good morning.

24 MR. FLEMING: William Fleming on behalf of Wade
25 Huettel. Good morning, your Honor.

F2qdsecc

1 THE COURT: Good morning.

2 Let me start with the SEC. What is the status from
3 your perspective? I know that there are some discovery issues
4 before the Magistrate Judge. I also have a default
5 application.

6 So why don't you tell me where you are and what is the
7 most efficient way to proceed

8 MR. BRODY: Sure, your Honor. There are currently
9 three discovery motions -- well, we could take a step back.

10 Many of the defendants in this case in discovery had
11 asserted Fifth Amendment privileges against self-incrimination.
12 So some of them haven't produced documents or have responsive
13 discovery and others have asserted a Fifth Amendment privilege
14 with respect to their depositions, or have told us that they
15 are going to assert that. We have either got declarations or
16 affidavits from them saying that with respect to any question
17 that we would have asked them in deposition, they will be
18 asserting the Fifth, or we are in the process of getting those
19 declarations.

20 There are three outstanding discovery motions that are
21 not -- some are briefed, some are not briefed, that are going
22 to be in front of Magistrate Judge Francis. Those are a motion
23 concerning Gibraltar in which Gibraltar claims that they are
24 prohibited under Bahamian law from producing certain documents.

25 The second, also concerning Gibraltar, will be the

F2qdsecc

1 locus of the deposition of the deposition of Mr. Davis and of a
2 30(b)(6) witness for Gibraltar when discovery in fact goes
3 forward. Then this week we filed a motion concerning certain
4 documents that are claimed to be privileged and, therefore, the
5 lawyer defendants have not produced those documents to the SEC,
6 and we claim on various grounds that either there is no
7 privilege or that privilege has been waived.

8 There is a hearing in front of Magistrate Judge
9 Francis that's presently scheduled for March 25th. I think
10 that should address the first two motions that I described.
11 We're trying to set a briefing schedule for the last motion so
12 that it could be decided at the same time and therefore
13 wouldn't have to have another hearing in front of the
14 Magistrate Judge. But it's unclear to me if we will be able to
15 have a briefing schedule that will allow us to, you know, have
16 that issue decided.

17 So that's the status of discovery. Right now there
18 are a couple of depositions that we're trying to schedule right
19 now for March, and that will be the deposition of a witness
20 from Scottsdale and then we're also trying to set up some
21 depositions of Canadian witnesses, including the brokerage firm
22 that handled a lot of the sales for I guess Carrillo and
23 Dr. Carrillo and as well as certain individuals who were
24 associated with Skylark, and those depositions are hard to
25 schedule because it is difficult for us to compel them to

F2qdsecc

1 testify since Canada is not a signator to the Hague Convention.

2 So in light of the fact that Judge Francis isn't going
3 to have the hearing until March 25th and then presumably if
4 Judge Francis rules in our favor, it will be another 30 days
5 before documents are produced and then depositions will take
6 place -- will follow that, it is both my view as well as the
7 view of the SEC in the Gibraltar case that we would like to
8 extend discovery probably by four months.

9 THE COURT: And are you talking about extending it to
10 when?

11 MR. BRODY: Well, I think right now the discovery
12 cutoff is at the end of March. So I think we would like to
13 extend it four months from there. This would be the first
14 request for an extension of discovery.

15 I know that the Carrillo and Huettel defendants have
16 consented to an extension of discovery but other defendants in
17 this matter have not.

18 THE COURT: OK. And who has not and what do they want
19 to do with discovery?

20 MR. BRODY: I believe that counsel for DeBeer has told
21 us that they would not consent to discovery and I think
22 likewise --

23 THE COURT: Have they completed all discovery?

24 MR. BRODY: What?

25 THE COURT: Have they completed all discovery?

F2qdsecc

1 MR. BRODY: I don't think they served a discovery
2 request, your Honor.

3 THE COURT: All right. And have they responded to
4 discovery?

5 MR. BRODY: I believe that in response to discovery,
6 DeBeer asserted the Fifth Amendment privilege.

7 THE COURT: OK.

8 MR. BRODY: And I think that at one point at least --
9 I haven't spoken to counsel recently on this issue, but at one
10 point counsel for Benjamin Kirk also said that they would not
11 agree to an extension of discovery. I think they made that
12 point at the last conference that we had before your Honor.

13 THE COURT: All right. And what do you want to do
14 about this default application? Is there anybody who you've
15 communicated with to the other side, either an attorney or any
16 other principal, with regard to the case against --

17 MR. BRODY: There are no EOVS -- the company ceased to
18 exist. Under Nevada law, I think both of them are now defunct.
19 Their business licenses were revoked under Nevada law. So I
20 don't think -- unless one of the individual, you know, former
21 officers or directors of the company, which would be Mr. DeBeer
22 or Mr. Francis, want to oppose the request for a default, I
23 don't think that there would be -- there is not going to be an
24 opposition. I don't believe there will be an opposition to the
25 motions.

F2qdsecc

1 THE COURT: All right. Then let me hear from the
2 defense. What do you want to do about discovery at this point?

3 MR. GOUREVITCH: Your Honor, at our last status
4 conference on October 21st, your Honor set a discovery cutoff
5 at the end of March. This case has dragged on for many years.
6 It has been very, very burdensome for Mr. DeBeer. Simply the
7 cost of defending this case is --

8 THE COURT: So you don't want to engage in any further
9 discovery?

10 MR. GOUREVITCH: We want to go straight to trial, your
11 Honor. We want a firm trial date, your Honor.

12 THE COURT: At this point you don't want to conduct
13 any further discovery?

14 MR. GOUREVITCH: No, your Honor.

15 THE COURT: And you haven't produced anything in
16 discovery. Are you ready to take an adverse inference at the
17 trial with regard to your not producing any discovery?

18 MR. GOUREVITCH: We anticipate that the SEC will seek
19 an adverse inference at trial.

20 THE COURT: OK. All right. And when do you want to
21 try this case?

22 MR. GOUREVITCH: Three months.

23 THE COURT: And what is the position of the other
24 defendants with regard to discovery?

25 MR. FELDMAN: Your Honor, on behalf of Benjamin Kirk,

F2qdsecc

1 to reiterate what Mr. Gourevitch said, that when we were here,
2 your Honor had many months ago said March 31st or the end March
3 is the deadline. When we were here, you made clear that --
4 this was back in October 21st -- you told me -- you told the
5 SEC to start the depositions immediately, that this was a hard
6 discovery cutoff deadline. At the time the SEC had referred to
7 you that there were foreign witnesses in non-Hague Convention
8 countries that they were looking to take their depositions, and
9 zero has happened in all that time since then. I mean, that
10 was what Mr. Brody just said to you now. They are looking to
11 take depositions in non-Hague Convention countries and wanted
12 to get started on that.

13 So I understand as to Carrillo and Huettel the
14 privilege issue, why they don't want to delay discovery on
15 those issues. But on the witnesses who they have been saying
16 they are gathering against my clients, who worked in Canada,
17 they have done nothing to move this cause forward. And like
18 Mr. Gourevitch, we want this case to end. We would like a
19 trial. We want to know what the answer is, and I need to
20 defend the case at the core. But it seems that the SEC is
21 still just investigating their case rather than being ready to
22 actually move it forward.

23 THE COURT: And you are also finished with whatever
24 discovery you want to conduct and are ready to take an adverse
25 inference with regard to the nonproduction of discovery?

F2qdsecc

1 MR. FELDMAN: We've received a lot of discovery from
2 the SEC. We produced the discovery we have. We produced a
3 privilege log. But it was a small batch of material that my
4 client possessed. We've taken the Fifth as to the answer of
5 the complaint, and I understand the SEC may seek an adverse
6 inference on that and we will litigate that as appropriate and
7 we may lose on that issue.

8 MR. BRODY: Your Honor, it is also correct to say that
9 they also asserted the Fifth Amendment with respect to
10 deposition as well. So it is not just that they asserted the
11 Fifth Amendment with respect to answering the complaint.

12 MR. FELDMAN: That is correct, your Honor.

13 THE COURT: And you don't anticipate that you will
14 offer any testimony or exhibits at trial that they have a right
15 to examine prior to trial?

16 MR. FELDMAN: I don't estimate that I will offer
17 anything at trial that they haven't seen in advance unless we
18 discover something and we will produce it immediately. That is
19 not my practice.

20 THE COURT: And then with regard to Mr. DeBeer, is
21 that your position also?

22 MR. GOUREVITCH: That is also our position, your
23 Honor. And I also would point out to the Court, your Honor,
24 that I believe this is also the second discovery extension.
25 The discovery cutoff was originally set for October and then

F2qdsecc

1 was extended into March. It was the SEC's proposal that we
2 have a discovery cutoff in October, then they suggested March.
3 And at our last conference we talked about this being a hard
4 discovery cutoff.

5 Thank you, your Honor.

6 MR. BRODY: Your Honor, if I could respond to that?

7 THE COURT: Let me ask one more question.

8 Neither one of you anticipate filing any motions,
9 dispositive motions?

10 MR. GOUREVITCH: Yes, your Honor, that is correct.

11 MR. FELDMAN: Yes. We don't see any summary judgment
12 motions in the case, your Honor.

13 THE COURT: Yes, sir.

14 MR. BRODY: With respect to the hard discovery cutoff,
15 I don't believe that your Honor did set a hard discovery
16 cutoff. I think what your Honor said is that when we came back
17 we would talk about the discovery cutoff, and if there was good
18 reason to extend the discovery cutoff, then the discovery would
19 be extended.

20 And, your Honor, there is absolutely good reason here,
21 because we have been trying to get documents from the law firm
22 defendants who really are what I will call the largest
23 repository of relevant documents in this case because, for
24 whatever reason, some of the other defendants in this case
25 didn't keep documents. So the law firms have been asserting

F2qdsecc

1 the privilege with respect to a lot of the documents. We don't
2 think there is an applicable privilege. And once those
3 documents are produced, that includes communications with the
4 defendants. Then we'll have, I think, a much better
5 understanding about what the facts are.

6 For a very long time they have been asserting this
7 privilege but we couldn't -- the issue wasn't ripe until we had
8 their privilege log and they're telling us that they weren't
9 going to testify at a deposition. So we have that now. We
10 brought the motion. There are still documents that -- still
11 discovery requests that the lawyers haven't responded to, and
12 we understand they are in the process of responding to them.
13 And I think the reason why the individual lawyers didn't
14 respond to them is because they have the understanding that the
15 law firm that was represented by counsel was going to be
16 producing those documents, but in fact the law firm and their
17 counsel never did. The searches that they were supposed to do
18 never produced the documents, and that created an additional
19 burden on the lawyers, the individual lawyers, now that they
20 have the documents from the law firm to now go about trying to
21 produce those documents.

22 But this is a significant repository of the relevant
23 documents. These weren't documents that we had during the
24 investigation or were able to get during the investigation and
25 now we believe that we're able to get them. We are highly

F2qdsecc

1 confident that Judge Francis will rule in our favor on these
2 issues --

3 THE COURT: And the documents in whose possession?

4 MR. BRODY: The lawyers' possession.

5 THE COURT: When you say "the lawyers," are there
6 still outstanding documents that you requested from DeBeer and
7 Kirk that are the subject of what Judge Francis is going to
8 address?

9 MR. BRODY: They are not documents from DeBeer and
10 Kirk.

11 THE COURT: OK.

12 MR. BRODY: But what we are --

13 THE COURT: So are you talking about Huettel and --

14 MR. BRODY: Right.

15 THE COURT: -- Carrillo?

16 MR. BRODY: There are two what I will call two sets of
17 documents. One set of documents are documents that were
18 produced by Joel Franklin of Pacific Blue. Mr. Franklin was
19 the CEO of Pacific Blue.

20 THE COURT: Right.

21 MR. BRODY: And he produced those documents, and
22 counsel for DeBeer asserted that he didn't have the right to
23 produce those documents and the documents were privileged.

24 THE COURT: OK.

25 MR. BRODY: So what the SEC did was we've sequestered

F2qdsecc

1 those documents and we've never looked at them.

2 THE COURT: All right. At what point is that supposed
3 to be resolved?

4 MR. BRODY: That's part of the motion that is in front
5 of Judge Francis.

6 THE COURT: All right. So Judge Francis --

7 MR. BRODY: So that is what I will call the first set
8 of documents. Judge Francis will resolve whether or not there
9 is a privilege with respect to those documents.

10 THE COURT: But who is asserting the privilege?

11 MR. BRODY: Well, I am assuming that Mr. DeBeer is
12 asserting the privilege. I don't know who is asserting the
13 privilege.

14 THE COURT: That's why --

15 MR. BRODY: Mr. DeBeer has previously stated that he
16 is asserting the privilege with respect to those documents, and
17 I am assuming, unless he no longer is doing that, that he is
18 going to continue to assert that privilege.

19 THE COURT: Well, that's why I asked you whether or
20 not the issue with regard to the outstanding discovery issues
21 are issues with regard to Kirk and DeBeer.

22 MR. BRODY: Well, they are certainly with respect to
23 Mr. DeBeer, because I think that these particular documents are
24 documents that directly relate to Mr. DeBeer because they are
25 Pacific Blue documents.

F2qdsecc

1 THE COURT: Well, if Judge Francis is going to decide
2 whether or not those documents should be produced and DeBeer is
3 objecting to those documents, then my position is DeBeer is in
4 no position to argue that they are ready for trial.

5 MR. BRODY: I agree with your Honor.

6 THE COURT: If that's not an outstanding issue, it
7 must be resolved by Magistrate Judge Francis, of which he has
8 an interest, of which he is the opposing or moving party.

9 MR. BRODY: And, frankly, those documents also concern
10 Mr. Kirk as well, because it was argued that Mr. Kirk was
11 controlling Pacific Blue. And while we haven't looked at those
12 documents because they have been sequestered, based on other
13 documents that we have, we know that Mr. Kirk had a significant
14 amount of correspondence with Pacific Blue and we anticipate
15 that there will be documents concerning him as well in there.

16 THE COURT: But has Kirk taken any position with
17 regard to whether those documents should be disclosed,
18 utilized, or whether they are privileged?

19 MR. BRODY: Not that I understand, your Honor.

20 THE COURT: OK.

21 MR. BRODY: The second repository of documents are the
22 documents from the lawyers.

23 THE COURT: Right.

24 MR. BRODY: And those also concern both Mr. DeBeer and
25 Mr. Kirk.

F2qdsecc

1 THE COURT: And have Mr. DeBeer and Mr. Kirk taken any
2 position with regard to the disclosure of those documents?

3 MR. BRODY: Neither one of those individuals have
4 objected. The only person who has objected to producing those
5 documents are the lawyers themselves.

6 THE COURT: OK. Mr. Gourevitch, did you want to --

7 MR. GOUREVITCH: Yes, your Honor. Thank you very
8 much.

9 Your Honor, Mr. DeBeer has taken the position since
10 the investigative phase consistently throughout this case that
11 these documents were privileged, and even during the
12 investigation suggested to the SEC that it might move before
13 the Court to address the privilege issue and that would be the
14 timely and efficient way to do it.

15 THE COURT: Well, isn't that now before Judge Francis?

16 MR. GOUREVITCH: Your Honor, it is now before Judge
17 Francis, but the SEC waited until about two days before this
18 hearing to do so. At the last hearing, when the privilege
19 issue had already arisen then and the SEC could have addressed
20 it, I raised the likelihood that I anticipated that the SEC
21 would at the next status conference request an additional
22 extension.

23 And your Honor said: I'm not likely to give it to
24 them because they haven't reasonably and efficiently used the
25 time that they have. If they say they are going to start

F2qdsecc

1 depositions immediately, I expect a significant amount of
2 progress to be made; and if the schedule has to be split, then
3 somebody needs to tell me.

4 And it goes on from there. But, your Honor, this
5 privilege issue has now been ripe for, I don't know, maybe four
6 or five years, since the investigative stage, and the SEC waits
7 until two days before this status conference to move before
8 Judge Francis to address that issue. I don't think that that's
9 a reason, respectfully --

10 THE COURT: Are you saying it wasn't raised before
11 Judge Francis until two days ago?

12 MR. GOUREVITCH: Yes, your Honor. That is correct.

13 MR. BRODY: Your Honor, this is totally disingenuous
14 for Mr. Gourevitch to be taking that position because, first of
15 all, we've already been in front of Magistrate Judge Francis
16 with respect to the issue of attorney documents. And so our
17 discovery requests I believe on the lawyer defendants was in
18 October of last year. And in response to that, that ended up
19 having us going in front of Magistrate Judge Francis, and then
20 some documents were produced and then there was a huge
21 privilege log that was also produced in connection to that
22 which we only recently just received.

23 THE COURT: Privilege log from whom?

24 MR. BRODY: From the lawyer defendants had produced
25 that privilege log.

F2qdsecc

1 So the issue of -- and the question of whether or not
2 the lawyers were going to testify in this case was also only
3 recently raised by counsel for Mr. Carrillo. So it's not that
4 we've sat and waited on this. We waited until the issue was
5 ripe.

6 And to the question about, you know, we didn't file
7 our motion in front of Judge Francis until Tuesday, well,
8 that's correct, your Honor, but we've been having good faith
9 discussions with counsel for all of the -- what I'll call all
10 of the parties who might have an interest in this, which is the
11 lawyers for -- the two lawyers with Mr. Ben Kirk's counsel and
12 Mr. DeBeer's counsel in some cases for weeks. So it's not that
13 we've been -- not that we've been delaying, it's that we got to
14 a point where we felt that we had to file because we had
15 exhausted all good faith conversations that could take place.

16 And when I spoke with Mr. Gourevitch on Tuesday before
17 we filed the motion, I basically said, look, you know, you've
18 made some points to us and you said that you might do other
19 things in the future, but we're at the point where we have to
20 move. We can't sit here and not move anymore. So for
21 Mr. Gourevitch to say that somehow the SEC has sat on its
22 hands, I don't understand where that is coming from given the
23 conversations that we just had earlier in this week.

24 THE COURT: What is the date of the conference with
25 Magistrate Judge Francis?

F2qdsecc

1 MR. BRODY: It's March 25th, your Honor. But, again,
2 the issues relating to our motion might not be decided in that
3 hearing because there isn't a briefing schedule yet. The
4 parties haven't had a briefing schedule with respect to the
5 motion that we filed.

6 THE COURT: Is he going to take briefing on this?

7 MR. BRODY: Well, I'm assuming he is going to take
8 briefing on this.

9 THE COURT: And you haven't presented this issue
10 squarely before him at this point?

11 MR. BRODY: The issue was presented to Magistrate
12 Judge Francis at the last conference that we had in front of
13 him, and at that point he understood the attorney-client
14 privilege issues and anticipated that the motions would be
15 filed. So we filed the motions.

16 THE COURT: And when is the motion supposed to be
17 fully submitted before Magistrate Judge Francis?

18 MR. BRODY: We don't have a briefing schedule, your
19 Honor. We reached out to defendants when we filed the motion
20 on Tuesday and asked them to provide us with a proposed
21 briefing schedule, and we haven't heard back from any of them
22 yet.

23 THE COURT: What is the position of the other parties,
24 the other defendants? Do you have a position? Yes, sir?

25 MR. PATTERSON: On behalf of Davis and Gibraltar, in

F2qdsecc

1 fairness, having made two discovery applications, we don't
2 object to the extension of discovery.

3 MR. FLEMING: Your Honor, William Fleming. I
4 represent Wade Huettel. Mr. Curran, who represents
5 Mr. Carrillo, is not here today; Doris Short is here for him.
6 So I'll just speak generally about what we call the lawyer
7 defendants.

8 We, too, have no objection to extension of discovery
9 largely because my client's deposition was scheduled for last
10 week. It was adjourned when I think we reached -- when we came
11 to a head on the issue of privilege because we were not seeking
12 to interrupt the deposition. Mr. Huettel can't waive the
13 privilege or disclose privileged materials without some sort of
14 either waiver by their clients or a ruling from the Court. So
15 we have no objection to extension of discovery.

16 I do want to, though, clarify the record a little bit
17 because the SEC has talked about the lawyer defendants
18 objecting to production of these privileged materials. In a
19 real sense, we've taken a neutral position because we don't
20 want to run afoul of our obligations as lawyers and disclose
21 information that might be privileged.

22 This issue, this case, started in 2010. At the time
23 the lawyer -- the law firm was represented by a man named
24 Charles Hecht, who produced documents but also produced a
25 privilege log. This is way back, years ago. When we got

F2qdsecc

1 involved in the case, that privilege log was outstanding, and
2 the issue in 2012 was raised about a possible crime fraud
3 exception to the privileged material.

4 Just to clarify the record, Mr. Curran -- I've seen
5 correspondence and I have, of course, spoken to him -- has
6 spoken numerous times with the SEC about having them vindicate
7 that claim of crime fraud or any other argument they might have
8 for why the privilege should not obtain here. And we were
9 anxious that that issue be resolved so that we could be in the
10 clear about whether we produce documents or not produce
11 documents, to testify about that information or not testify
12 about that information. So the issue, in fairness to
13 Mr. Gourevitch and Mr. Feldman, it has been around awhile, but
14 now it has come to a head so we do not object to the extension
15 of discovery so that we can resolve the issue and then --

16 THE COURT: Tell me -- let me hear from the SEC --
17 what discovery do you want to conduct, and what is the sequence
18 of events that you want to conduct that discovery?

19 MR. BRODY: Well, so our view is that we are going to
20 get an order from Judge Francis either at the end of March or
21 early April --

22 THE COURT: Right.

23 MR. BRODY: -- that will grant all of the motions --
24 the three motions that the SEC has filed. So that will result
25 in three things happening. The first is that Gibraltar either

F2qdsecc

1 will or won't produce documents. If they don't produce
2 documents and don't appear for a deposition because they are
3 still maintaining that they are precluded under Bahamian law
4 from doing so, then we may be forced to move for some type of
5 sanction, including default, if that is the case. But if they
6 do produce documents, then we will review those documents and
7 we will take the depositions of both Mr. Davis and then some
8 representative from Gibraltar, whoever that is.

9 THE COURT: So you are talking about Gibraltar
10 production and depositions?

11 MR. BRODY: Right. And Mr. O'Rourke --

12 MR. O'ROURKE: If I could just add? Depending on what
13 those documents show, there might be other depositions taken as
14 well.

15 THE COURT: Like what? At this point, I am not going
16 to have these vague conversation about what you think might be
17 out there.

18 MR. O'ROURKE: Your Honor, they have taken the
19 position that documents pertaining to approximately 1,200
20 customers and over 100,000 transactions are being retained,
21 they claim, pursuant to Bahamian law, but that has been briefed
22 with Judge Francis, and that they also were maintaining email
23 service pertaining to emails dating to approximately 2009. So
24 it is their emails with the United States customers, you know,
25 that are at issue.

F2qdsecc

1 THE COURT: So that still doesn't answer my question.
2 You said additional depositions, and you are now alluding to
3 additional document production.

4 MR. O'ROURKE: Well, it is not additional. That is
5 what is at issue in their motion for a protective order. Back
6 in October I filed a letter, a letter -- a premotion with your
7 Honor, and your Honor referred it to Magistrate Judge Francis.
8 We had a premotion conference and that has been briefed and it
9 is set for March 25 for all of these documents relating to
10 United States customers.

11 This claim of Bahamian secrecy which we believe was
12 shown -- and they disagree -- is nonexistent. So it's
13 basically we have been -- there has been a major roadblock from
14 the getgo that's been around. We took the position, advised
15 your Honor of it in a submission related to the scheduling
16 orderly earlier in 2014, that they should be moving for a
17 protective order. They didn't. So I filed something. And
18 then Magistrate Judge Francis said, indeed, they should be the
19 ones moving. So that briefing took place in December and
20 January and is now scheduled.

21 But that's, you know, the routine discovery that one
22 would get in the way of documents to determine what depositions
23 might be necessary. Maybe none. But if we have the emails
24 with the United States customers that relate to the soliciting
25 issue, then it may be that we want to take the customers, but

F2qdsecc

1 at the very least we also have the question of the depositions
2 of Davis and Gibraltar, and they've filed an application for a
3 protective order on that. We submitted a letter in opposition
4 to that. That's also scheduled for March 25. We are going to
5 want to depose them.

6 But it is the routine document discovery that we
7 haven't received from them yet in spite of major efforts to get
8 there, and, you know, they claim they have a basis and we claim
9 otherwise, and Judge Francis ruled, even when focusing on it
10 and has focused on it and will again focus on it on March 25th,
11 but I can't exactly say what might come from that.

12 THE COURT: What I'm interested in right now is what
13 it is that you anticipate that you need to do at this point?

14 MR. O'ROURKE: At this point I think we need to get
15 the documents and we need for them to produce it, or they are
16 going to produce it if Judge Francis orders it. We need to
17 review the document and we need the depositions of the Warren
18 Davis defendant and the 30(b)(6) deposition of the entity.

19 They are taking the position that there is no one to
20 produce for the 30(b)(6), although Mr. Davis was the president
21 of the company, and that gets into their argument that they are
22 claiming they are in liquidation, but they never got permission
23 to go into be liquidation as a broker-dealer as required by
24 Bahamian law.

25 THE COURT: Well, if there is no one else, you still

F2qdsecc

1 have Davis so --

2 MR. O'ROURKE: Exactly. Exactly. So we are going to
3 need -- and that very well may be, if we get the full
4 production and Davis and he answers questions and shows up for
5 his deposition, that may even very well be --

6 THE COURT: What else do you anticipate at this point
7 that you need to do?

8 MR. O'ROURKE: That's our basic -- I feel the need to
9 state a reservation depending upon what their basic documents,
10 what would be routine discovery would show.

11 THE COURT: But at this point you can't articulate any
12 other documents or depositions that you anticipate at this
13 point?

14 MR. O'ROURKE: Not at this point, or we wouldn't get
15 documents, you know, in the near term.

16 THE COURT: What is the story with the Canadian
17 deposition?

18 MR. BRODY: Either we are going to be able to take
19 those depositions in March or April or we won't be able to take
20 them at all. If the people just start to tell us, you know,
21 pound sand, then there is not much we can do about that.

22 THE COURT: So when do you think you will have a
23 response? Have you made that inquiry?

24 MR. BRODY: I have been making those inquiries and on
25 almost a daily basis trying to speak with the people from

F2qdsecc

1 Skylark. I think it is mostly the Skylark witnesses who I'm
2 having problems scheduling. I'm not having problems with
3 trying to schedule other Canadian witnesses.

4 THE COURT: And how many witnesses are you talking
5 about taking depositions of?

6 MR. BRODY: Right now I am looking at three to four
7 depositions of Skylark witnesses, one deposition of someone
8 from Scottsdale, and one or two depositions of someone from the
9 Canadian brokerage firm. And then we, of course, have the
10 Carrillo and Huettel depositions as well.

11 THE COURT: Is there any reason why those depositions
12 can't go forward now?

13 MR. BRODY: With the exception of Carrillo and
14 Huettel, no. That's why I said I believe --

15 THE COURT: I mean, the Canadian depositions.

16 MR. BRODY: If we are either going to get -- we are
17 either going to have those depositions in March or maybe early
18 April or not at all, your Honor.

19 THE COURT: All right.

20 MR. BRODY: So our intention is to do those
21 depositions now, and those depositions will be done before the
22 end of the discovery cutoff unless enough of the lawyers on the
23 other side, and there are a lot of them, tell us that they
24 can't, you know, work within that schedule. So then, you know,
25 as Mr. O'Rourke said, we have the Gibraltar deposition and we

F2qdsecc

1 have the Carrillo and Huettel deposition. Those three
2 depositions won't take place until, you know, April at the
3 earliest -- probably May at the earliest because we are not
4 going to receive the documents. And, you know, like I said
5 before, we have a large number of documents for Pacific Blue
6 that we have sequestered and haven't looked at at all because
7 of the objection by DeBeer. So that issue will be decided by
8 Magistrate Judge Francis, and then we'll review those documents
9 as quickly as we possibly can.

10 THE COURT: All right.

11 MR. GOUREVITCH: Your Honor, may I be heard briefly?

12 THE COURT: Yes.

13 MR. GOUREVITCH: With respect to these documents that
14 he is referring to of Franklin, the SEC has had those since the
15 investigative stage in this case. They have known of this
16 issue of privilege coming down the pike, and candidly they just
17 waited until the very last moment, until two days before this
18 status conference, to tee up before the Court.

19 So I would like to read just from our last status
20 conference because I anticipated this. And I said to your
21 Honor: "I would just like to make one last request; that the
22 discovery cutoff really is for March 31, and that it doesn't
23 start to roll further.

24 "The Court: What do you want me to do? That is the
25 date."

F2qdsecc

1 I'd like to ask your Honor to hold the SEC to that
2 date.

3 THE COURT: This is what I am going to do.

4 MR. FELDMAN: Your Honor, just one moment. I'm sorry.

5 THE COURT: Yes.

6 MR. FELDMAN: On the same point with the Canadian
7 depositions, the SEC was very clear the last time, on
8 October 21, that they had these foreign witnesses in non-Hague
9 Convention countries, that they anticipated taking those
10 depositions very soon, and those are the ones they are now
11 talking about wanting to do in March and April.

12 Your Honor was also clear with everybody here. You
13 said if it is the defendants' fault that these things don't get
14 done, then they might get an extension, and if it is your
15 fault, SEC, then there is no extension. I understand the need
16 to be able to get an extension on these attorney-client
17 privilege issues, but there is no reason for an extension
18 relating to these Canadian deposition. They have had their
19 chance. They sat on their hands for the last six months. And
20 I would request that your Honor not allow them to continue
21 taking depositions that they could have taken over the last two
22 years.

23 THE COURT: Well -- yes.

24 MR. O'ROURKE: Your Honor, with respect to Gibraltar,
25 I just note that Gibraltar's counsel does not oppose extension

F2qdsecc

1 knowing full well that the issues are before the Magistrate
2 Judge. We are in coordinated discovery and I think an
3 appropriate extension --

4 THE COURT: Is DeBeer and Kirk going to participate in
5 these Canadian depositions?

6 MR. FELDMAN: We, on behalf of Mr. Kirk, intend to
7 participate in the deposition either by phone or in person.

8 MR. GOUREVITCH: Your Honor, it depends on who the
9 witnesses are. We do not yet know the identity of them.
10 Obviously, to the extent that these people had no contact with
11 Mr. DeBeer, we may not.

12 THE COURT: This is my position.

13 With regard to the Canadian depositions, I think you
14 should go ahead and immediately determine whether they are
15 going to be done and schedule those depositions in March. To
16 the extent that March is not a convenient date for the
17 witnesses or for all of the lawyers, but primarily for the
18 witnesses, unless the lawyers can give me a real good -- unless
19 you can agree that for the convenience of the lawyers you
20 should do it in April, to the extent that the witnesses are not
21 available in March, you do those depositions in April. But I
22 want you to first go ahead and schedule all those depositions
23 for the timeframe that we had discussed.

24 With regard to the other possible depositions and
25 documents, the only thing that I can reasonably do is to

F2qdsecc

1 indicate that clearly within 30 days of the decision by
2 Magistrate Judge Francis, if the decision is to produce the
3 documents, those documents should be produced within 30 days or
4 on any other schedule that Magistrate Judge Francis believes is
5 appropriate. Once those documents are produced, within the
6 next 30 days the depositions should take place, if they are
7 going to take place. At this point I don't -- I'm not even
8 sure that you are saying that the depositions would take place
9 if you didn't receive the documents.

10 MR. O'ROURKE: Oh, we definitely would want the
11 depositions without the documents if that is the best we could
12 get.

13 THE COURT: Well, then I'm going to indicate that
14 within 30 days of Judge Francis' decision that they should
15 produce the documents, those documents should be produced. And
16 within 30 days of receiving those documents, you should have
17 those depositions done.

18 If Judge Francis rules that the documents are not to
19 be produced, then within 30 days of his decision not to produce
20 the documents, you should be ready to do the depositions and
21 get the depositions done. And then to the extent that either
22 the documents or depositions indicate that other discovery
23 beyond the timeframe that we've discussed previously should be
24 done, then you agree upon it or you let me know in writing by
25 letter what else needs to be done that could not have been

F2qdsecc

1 anticipated, and the other side could argue about whether or
2 not you should be engaged in that further discovery beyond that
3 time period.

4 As I say, I don't see any reason why these Canadian
5 depositions can't be done within 30 to 60 days, and I don't see
6 any reason why documents can't be produced within 30 days of
7 Magistrate Judge Francis' order to produce those documents
8 and/or the depositions take place within 30 days of receiving
9 the documents or within 30 days of Judge Francis' decision that
10 the documents need not be produced.

11 MR. O'ROURKE: Your Honor, can I address one issue?

12 THE COURT: Yes.

13 MR. O'ROURKE: With respect to the scheduling of the
14 depositions, our position is -- and we have laid it out to
15 Judge Francis -- that they are going to be in New York. If we
16 are wrong on that and it needs to be in the Bahamas, we would
17 do our best to get it within 30 days. We have to get country
18 clearance, as your Honor knows, to go into the country and --

19 THE COURT: Do you anticipate that Magistrate Judge
20 Francis is going to rule on the issue of where the depositions
21 are going to take place? Have you put that before him?

22 MR. O'ROURKE: Your Honor, it has been raised.
23 Counsel for the defendants submitted a letter to him. We
24 submitted a letter in opposition. I don't know if he wants
25 more briefing or not.

F2qdsecc

1 THE COURT: Well, you should press that issue so that
2 as soon as you -- you should tell him on the 25th that my
3 position is that as soon as he rules with regard to the
4 document production, he should at the same time tell you where
5 those depositions are going to take place so you can go forward
6 and take those depositions.

7 MR. O'ROURKE: Tell him what time the depositions --

8 THE COURT: Tell you where those depositions are going
9 to take place at that time.

10 MR. O'ROURKE: OK.

11 THE COURT: Rule on that at the same time so that you
12 can go ahead. So, you know, I would even go ahead and start
13 discussing dates for all of these depositions within that
14 timeframe. You know, I don't know whether or not he is going
15 to decide that on the 25th of March or whether he is going to
16 take it under further submission and decide it later. But to
17 the extent that it is pending before him for decision, that is
18 to the extent that I am going to move the discovery schedule.

19 MR. O'ROURKE: And to the extent, based on the
20 documents that are produced or not produced, our review of
21 them, if there is additional follow-up or holes that are not
22 there that we have to otherwise go get, then we would talk with
23 counsel and --

24 THE COURT: If you can agree upon it and agree upon it
25 on a reasonable schedule, that fine. If you can't agree upon

F2qdsecc

1 it, then make the application by letter to this Court or to
2 Magistrate Judge Francis, and we will indicate right away and
3 you will get a quick response whether or not that seems
4 appropriate.

5 MR. O'ROURKE: OK.

6 THE COURT: Obviously, from my perspective, my first
7 review is to the extent that you could not have anticipated
8 this prior to receiving some document or some other deposition,
9 I would at least give serious consideration to give you an
10 opportunity for further discovery. To the extent that, you
11 know, it is something you could have done six months ago and
12 now you just decided that you want to do it, I need a better
13 argument than that at this point so that we can just move this
14 case forward at this point.

15 But at least I will know what things that you already
16 anticipate that you need to do with Davis, Gibraltar, the
17 Canadian entities and individuals. So to the extent there is
18 something else that you can think of now that needs to be done,
19 then you had better let the other side know and prepare to try
20 to do that on that same schedule that I've indicated. All
21 right?

22 MR. O'ROURKE: Yes, your Honor.

23 MR. BRODY: Your Honor, if I may? With respect to the
24 Carrillo Huettel versus the Gibraltar case, I think the cases
25 are in two very distinct positions, which is that the SEC in

F2qdsecc

1 the Gibraltar case really haven't even gotten the basic
2 documents to almost start discovery, because the Gibraltar
3 defendants have been saying that they are not going to produce
4 things and those are teed up. The reason why these cases are
5 coordinated for discovery is because of the existence of the
6 Gibraltar and the Davis defendants. So it may be, your Honor,
7 that once those depositions have taken place, that it might
8 make sense to separate the two cases.

9 THE COURT: That may or may not be true, but that
10 doesn't change my position as to when things should take
11 place --

12 MR. BRODY: OK.

13 THE COURT: -- and when the decision should be made
14 about those things. So unlike some cases, I'm not letting the
15 older case drag, you know, the newer case. I am going to let
16 the newer case speed up the older case. Whichever case is
17 moving forward more quickly, then you have to catch up with
18 that, or give me some good reason why you are not on that same
19 schedule. But that is fine. If things change, you know, I'll
20 consider that. But, you know, I think the first thing to do is
21 if we can start gearing it up and then try to get an idea from
22 Magistrate Judge Francis how he wants to proceed in terms of
23 when and on what submissions and how he wants to decide those
24 issues, because that probably is one thing that may push the
25 date back, which I would anticipate if he is not going to

F2qdsecc

1 decide this when you meet with him before the end of March.

2 In that vein, then, I think it makes sense to
3 schedule -- I am going to schedule a conference before me, say,
4 May 14th at 10:30. If we don't need to meet, just let me know
5 what the status is with regard to Magistrate Judges Francis.
6 If things have moved quickly, then let me know that you are on
7 schedule to do what we talked about. We can meet on May 14th
8 to try to figure out when things are going to be finished and
9 whether or not we should be moving forward with setting a trial
10 date, and I will be prepared to give you a trial date as early
11 as on May 14th when we meet, depending on what the status is
12 and depending on whether the parties anticipate that there are
13 going to be any dispositive motions before trial.

14 MR. BRODY: There is expert discovery that still is
15 going to follow the fact discovery, your Honor. So with the
16 ending of fact discovery, I think there was some time built
17 into the original schedule for expert discovery.

18 THE COURT: What was the --

19 MR. BRODY: I don't remember if it was 30 days or 60
20 days. It is not a long period of time.

21 THE COURT: Unless you can convince me, quite frankly,
22 I don't see any reason not to go ahead and move forward with
23 the expert discovery on the schedule that you agreed to.

24 MR. BRODY: Well, the expert discovery, your Honor,
25 that we at least anticipate focuses significantly on the

F2qdsecc

1 documents and the testimony that we have yet to receive from
2 Carrillo and Huettel.

3 THE COURT: That doesn't stop you from going ahead and
4 getting yourself an expert, designating an expert, being ready
5 for that expert to review those documents.

6 MR. O'ROURKE: But your Honor --

7 THE COURT: I don't know what the schedule was in
8 terms of when expert discovery was supposed to start and when
9 it was supposed to be concluded, but I'm not sure that you
10 can't still use those same dates.

11 MR. GOUREVITCH: Your Honor, I would like to make a
12 request that we just set a trial date right now. I am going to
13 suggest --

14 THE COURT: You don't intend to engage in any expert
15 discovery.

16 MR. GOUREVITCH: We are not intending to engage in any
17 expert discovery. And my concern, your Honor, is that this is
18 just going to roll on and on unless we set a trial date.

19 THE COURT: When do you want to try this case?

20 MR. GOUREVITCH: I was going to suggest we set a date
21 in early September, your Honor. I think that will give time to
22 resolve the outstanding issues, which I figure will take about
23 90/100 days, and then it will give everybody a little bit of
24 time to prepare for trial.

25 MR. BRODY: Your Honor, we anticipates moving for

F2qdsecc

1 summary judgment in this case against Mr. DeBeer and against
2 Mr. Kirk and against all of the defendants, essentially, who
3 have asserted the Fifth Amendment privilege. So I don't
4 believe that a September trial date is realistic, your Honor.

5 THE COURT: Well, you should now start thinking about,
6 in relationship to when you would complete discovery, how
7 quickly that you will file summary judgment motions. I will
8 tell you this. If summary judgment motions aren't filed -- and
9 I would expect them to be filed in a timely manner -- I will
10 consider giving you a September trial date.

11 MR. GOUREVITCH: Thank you very much, your Honor.

12 THE COURT: I do have a multi-defendant criminal trial
13 that is scheduled at this point for the first three weeks of
14 September. I'm not sure they are going to be ready and/or the
15 defendants are all going to be going to trial. So if that
16 folds, I will consider fitting you in. If there are no summary
17 judgment motions or to the extent that I deny summary judgment
18 motions, if they have been made and fully briefed, you should
19 be prepared as early as September to try this case --

20 MR. O'ROURKE: Your Honor, if I could with respect --

21 THE COURT: -- or both cases.

22 MR. O'ROURKE: If I could, with respect to experts,
23 can I suggest that we address that at the May 14th conference?

24 THE COURT: Well, what is the schedule now of when
25 expert discovery was supposed to commence?

F2qdsecc

1 MR. O'ROURKE: I believe it was expert reports by
2 May 1, expert discovery completed by June 1. Again, very
3 fundamental documents we are seeking, and we need to get those
4 for our expert to review them. So maybe --

5 THE COURT: The only thing that I will say at this
6 point, we can review it further on May 14th, but I expect the
7 expert reports to be prepared and exchanged within 30 days
8 after the depositions are done or the documents are received.
9 OK? So just gear yourself up to move forward right away with
10 that. We can discuss it further on May 14th, or to the extent
11 Magistrate Judge Francis believes different dates are
12 appropriate or to the extent that the parties can agree on
13 what's reasonable, then you can just let me know by letter.

14 MR. O'ROURKE: Thank you, your Honor.

15 THE COURT: Now, is there any reason why I should not
16 act upon your motion for a default at this point?

17 MR. BRODY: No, your Honor.

18 THE COURT: Anyone who has an interest in this, they
19 had better let me know or send me a letter, or if there is a
20 party or a lawyer who believes that they wish to oppose this.

21 Did you serve this motion on any particular parties?

22 MR. BRODY: We served the motions, I believe, on
23 Mr. Franklin and Mr. DeBeer, who were the former officers and
24 directors of these companies.

25 THE COURT: OK. Well, then, you can anticipate that

F2qdsecc

1 unless I get something very quickly in the next couple of days,
2 I am going to go ahead and act upon that motion and grant that
3 motion as unopposed. All right?

4 All right. So let's see where we are by May. Talk
5 with each other and try to set up some -- I would prefer that
6 you set up some tentative schedules that would anticipate that
7 everything is going to happen quickly. So you will know that
8 if things happen quickly, then those are the dates you are
9 going to use. If things don't happen on that schedule, then
10 you can obviously adjust. But I don't want you to wait to the
11 last minute to try to start figuring out when you might be
12 doing depositions or if people are available, lawyers and
13 parties are available, particularly for depositions. All
14 right?

15 So is there anything else we need to address today?

16 (Pause)

17 All right. Then let's see if we can move efficiently
18 that way. If there are any problems, bring them up with
19 Magistrate Judge Francis, and I will speak to him also and
20 encourage him to try to resolve this as quickly as possible.
21 If you haven't agreed upon some proposed further submissions
22 before him on any of these issues, I would suggest to you that
23 you try to talk about a quick schedule right away and propose
24 it to Magistrate Judge Francis, or encourage him by letter to
25 be in a position to go ahead and take any submissions that he

F2qdsecc

1 wants to take before the conference and try to decide this at
2 the conference. OK? All right?

3 MR. BRODY: Your Honor --

4 THE COURT: Yes.

5 MR. BRODY: -- I believe that the decision on the
6 default motion will actually be an important consideration for
7 Magistrate Judge Francis to consider with respect to the
8 privilege issues that are raised in front of him as well. So
9 to the extent that a decision can be reached on that prior to
10 the conference --

11 THE COURT: I have looked at the papers. Unless I
12 hear something that makes me hesitate to grant that motion
13 within the next week, that motion is going to be acted upon
14 before the end of next week.

15 MR. BRODY: Thank you, your Honor.

16 THE COURT: All right. I'll see you in May.

17
18 - - -
19
20
21
22
23
24
25